OCT 28 1991

No. 91-575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VINOD C. BHAN, CRNA,
Petitioner,

v.

NME HOSPITALS, INC.,
NATIONAL MEDICAL ENTERPRISES, INC.,
and JOHN E. MENAUGH,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN ASSOCIATION OF NURSE ANESTHETISTS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Association of Nurse Anesthetists ("AANA") hereby moves this Court for leave to file the attached brief amicus curiae in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed on behalf of Vinod C. Bhan, CRNA.

As grounds therefor, AANA states that the decision below, using a rule of reason analysis, upholds a hospital's boycott of Certified Registered Nurse Anesthetists ("CRNAs"), accomplished by a newly adopted hospital policy of having all anesthesia provided by Medical Doctors of Anesthesiology ("MDAs"). Under the new hospital policy, Vinod C. Bhan, CRNA, lost his job as an anesthesia provider which he had performed with distinction for over three years. The hospital's boycott of CRNAs has the effect of excluding all 23,000 members of the

AANA from working at the hospital. Similar boycotts, enforced in other hospitals, exclude CRNAs from significant employment opportunities. AANA, as a national association representing CRNAs, is in a unique position to address these issues.

To protect the interests of the public and AANA members in vigorous competition as a method of controlling costs in the delivery of anesthesia services, AANA requests this Court to receive the attached brief and resolve the conflict between the Ninth and Third Circuits as to the applicability of the per se rule to group boycotts in circumstances such as those present here. This Court should make it clear that boycotts of nonphysician health care providers by hospitals and physicians constitute a per se violation of the antitrust laws.

Respondents have refused to consent to the granting of this motion.

For the above stated reasons, on behalf of the American Association of Nurse Anesthetists, we request that the motion be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
ARGUMENT	3
THIS COURT SHOULD REVIEW THE DECISION BELOW TO RESOLVE THE CONFLICT WITH THE THIRD CIRCUIT CONCERNING THE APPLICATION OF A PER SE APPROACH TO PHYSICIAN BOYCOTTS OF NONPHYSICIAN HEALTH CARE PROVIDERS	3
A. Manteca Hospital's Boycott of CRNAs	3
B. CRNAs such as Bhan Are Competitors, for Antitrust Purposes, of Anesthesiologists, such as Dr. Cull and Dr. Suk	5
C. The Court Below Improperly Rejected a Per Se Approach to the Boycott Based on Hypothetical Pro-Competitive Effects	5
D. The Third Circuit's Use of a Per Se Analysis in *Weiss* v. *York Hospital* Follows Applicable Supreme Court Precedent and Is Inconsistent with the Ninth Circuit's Rejection of the Per Se Approach in This Case	6
CONCLUSION	11

TABLE OF AUTHORITIES

Cases: Page

Arizona v. *Maricopa County Medical Soc'y*, 457 U.S. 345 (1982) 9

Bhan v. *NME Hospitals*, 772 F.2d 1467 (9th Cir. 1985) 2, 5

Bhan v. *NME Hospitals*, 929 F.2d 1402 (9th Cir. 1991) 4

Business Elec. Corp. v. *Sharp Elec. Corp.*, 485 U.S. 717 (1988) 8

Fuentes v. *Southhill Cardiology*, —— F.2d —— (3rd Cir. Oct. 1, 1991, No. 90-3493, available on Westlaw, 91 WL 192019 10

Klor's v. *Broadway Hale Stores*, 359 U.S. 207 (1959) 8

Oltz v. *St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988) 2, 5

Summit Health Ltd. v. *Pinhas*, 111 S. Ct. 1842 (1991) 9, 10

Weiss v. *York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) 5, 6

Statutes:

Section 1 of the Sherman Act, 15 U.S.C. § 1 ..... 5, 10

Law Review Articles:

Note, *The Physician Cartel—Potential Hospital Federal Antitrust Liability in Class-Based Denial of Staff Privileges to Clinical Psychologists*, 39 Drake L. Rev. 509 (1989-90) 7

Treatises:

Holmes, *Antitrust Law Handbook* 250 (1991 ed.) 8

Miscellaneous:

Bechtoldt, *Committee on Anesthesia Study Anesthetic-Related Deaths: 1969-1976*, 42 N.C. Med. J. 253 (1981) 5

Health Care For American Veterans, H. Comm. Print No. 36, 95th Cong., 1st Sess. (1977) 5

Forrest, *Outcome—The Effect of the Provider: Health Care Delivery in Anesthesia* 137 (George F. Stickly Co. 1980) 5

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BRIEF OF THE AMERICAN ASSOCIATION OF NURSE ANESTHETISTS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Association of Nurse Anesthetists ("AANA") is an organization of more than 23,000 certified registered nurse anesthetists ("CRNAs") dedicated to providing quality anesthesia care in the United States. The practice of nurse anesthesia is well recognized in the health care community. CRNAs practice in all 50 states and administer over 65 percent of all anesthetics in this country.

Anesthesia may be provided either by a CRNA or by an anesthesiologist. Some CRNA's compete directly with medical doctors of anesthesiology ("MDAs") in the mar-

ket for anesthesia services. Some hospitals, in fact, do not have any MDAs, and all anesthesia care is provided by CRNAs. For these reasons, courts have recognized that CRNAs and anesthesiologists can be direct competitors for antitrust purposes. *Oltz* v. *St. Peter's Community Hospital*, 861 F.2d 1440, 1445-48 (9th Cir. 1988); *Bhan* v. *NME Hospitals*, 772 F.2d 1467, 1471 (9th Cir. 1985). Generally, CRNAs provide a lower cost alternative to MDAs. No study has found any significant difference in anesthesia outcome by provider type.

CRNAs function in a variety of practice situations: some are independent contractors who administer anesthesia in hospitals, some work for entities that furnish anesthesia services to hospitals under contract, others are employed by hospitals or in nonhospital environments by clinics, trauma centers and health maintenance organizations, and still others are employed by physician anesthesiologists. CRNAs are certified to administer anesthesia and are legally authorized to do so in every jurisdiction.

Accordingly, AANA has a direct and substantial interest in the decision below which rejects an antitrust attack on Manteca Hospital's exclusion of CRNAs from practicing their profession. The boycott was accomplished by Manteca Hospital's adoption of a policy that only medical doctors of anesthesiology could administer anesthesia in the hospital.

ARGUMENT

THIS COURT SHOULD REVIEW THE DECISION BELOW TO RESOLVE THE CONFLICT WITH THE THIRD CIRCUIT CONCERNING THE APPLICATION OF A PER SE APPROACH TO PHYSICIAN BOYCOTTS OF NONPHYSICIAN HEALTH CARE PROVIDERS

A. Manteca Hospital's Boycott of CRNAs

Manteca Hospital, a 49-bed facility, is the only acute care hospital in a California central valley town of 37,000 people.[1] Anesthesia services were provided by Associated Anesthesia Services ("AAS") pursuant to a contract with the hospital.[2] AAS assigned Dr. Cull, a physician anesthesia provider, and Mr. Bhan, a CRNA, to the hospital.[3] The hospital and its surgeons became dissatisfied with AAS's performance.[4] The hospital notified AAS that its contract would not be renewed and notified Dr. Cull that his staff privileges would be terminated.[5] Dr. Cull's attorney threatened legal action against the hospital after which the hospital agreed to renew his staff privileges.[6] The hospital also was considering the employment of Dr. Suk, an anesthesiologist.

Without reliance on a tape recording of a key Surgery Committee meeting, the use of which was rejected by the District Court,[7] the reasons for the "MDA-only"

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[1] 929 F.2d at 1407. [Pet. App. at 2.] Parallel citations to the Appendix to the Petition for a Writ of Certiorari are given in brackets.

[2] *Id.* at 1408. [Pet. App. at 3.]

[3] *Id.* [Pet. App. at 4.]

[4] *Id.* [Pet. App. at 4-5.]

[5] *Id.* [Pet. App. at 4.]

[6] *Id.* [Pet. App. at 4.]

[7] 669 F. Supp. 998, 1009 n.4. [Pet. App. at 46 n.4.]

policy are clearly reflected in the deposition testimony of John E. Menaugh, the hospital administrator. The perceived economics of the situation were such that the two MDAs and one CRNA could not be allowed to work at the hospital.[8] If all three were given privileges it would be "a competitive situation,"[9] and under such circumstances the surgeons would not be inclined to use Dr. Cull's services.[10]

The hospital's adoption of the MDA-only policy permitted Dr. Cull and Dr. Suk to divide the available work and completely excluded not only CRNA Bhan, but all CRNAs.[11]

The Court of Appeals framed the issue on appeal in the following terms.

> "The district court found that the plaintiff offered sufficient evidence of a conspiracy to survive summary judgment and that the restraint affected interstate commerce. The parties do not challenge these findings. . . . The only issue raised on appeal, therefore, is whether the practice was an unreasonable restraint of trade." 929 F.2d at 1410.

The AANA submits that the practice *was* an unreasonable restraint of trade. The boycott in this case was exclusively anticompetitive in its purpose and in its effect. Moreover, decades of experience in the courts and before the Federal Trade Commission have shown physician boycotts of nonphysician health care providers to be motivated invariably by anticompetitive objectives and without offsetting justification. The Third Circuit's decision in *Weiss* v. *York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), holding a similar

[8] Menaugh, Vol. II, Tr. 245.

[9] Menaugh, Vol. II, Tr. 295.

[10] Menaugh, Vol. II, Tr. 246.

[11] 669 F. Supp. 998, 1010. [Pet. App. at 48-49.]

restriction to be a per se violation of the Sherman Act, was correct.

B. CRNAs such as Bhan Are Competitors, for Antitrust Purposes, of Anesthesiologists, such as Dr. Cull and Dr. Suk

CRNAs compete in the market for anesthesia services with MDAs in that a surgeon or other physician may elect to have anesthesia provided either by a CRNA under the surgeons or physicians direction or by an MDA who is licensed to administer anesthesia independently. Because of this role overlap, MDAs and CRNAs can be competitors for antitrust purposes. *Oltz* v. *St. Peter's Community Hospital*, 861 F.2d 1440, 1445-48 (9th Cir. 1988); *Bhan* v. *NME Hospitals*, 772 F.2d 1467, 1471 (9th Cir. 1985). There is no evidence that use of an MDA rather than a CRNA improves patient care.[12]

C. The Court Below Improperly Rejected a Per Se Approach to the Boycott Based on Hypothetical Pro-Competitive Effects

The court below, while noting that some boycotts are illegal per se, declined to apply a per se approach to Manteca's boycott of CRNAs on the ground that boycotts of a class of health care providers are not "always anti-competitive."[13] Such restrictions, the Court theorized, without any citation to or reference to the record, can help the hospital ". . . provide more efficient, higher

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[12] There is no statistically significant difference in result between CRNA-administered anesthesia and MDA-administered anesthesia. *Health Care For American Veterans*, H. Comm. Print No. 36, 95th Cong., 1st Sess. (1977); Bechtoldt, *Committee on Anesthesia Study-Anesthetic-Related Deaths: 1969-1976*, 42 N.C. Med. J. 253, 257 (1981); Forrest, *Outcome—The Effect of the Provider: Health Care Delivery in Anesthesia* 137 (George F. Stickly Co. 1980).

[13] 929 F.2d at 1412. [Pet. App. at 12-13.]

quality service in order to compete against other hospitals." [14]

This critical assumption became the linchpin of the Ninth Circuit's rejection of a per se analysis, even though the case was decided on motion for summary judgment and the defendants gave no indication that they intended to offer evidence at trial of any such doubtful proposition. Indeed, the court's action denied Bhan the opportunity to refute such a showing. Thus, the court below rejected a per se approach based upon a judicially created presumption of a pro-competitive effect.

D. The Third Circuit's Use of a Per Se Analysis in *Weiss* v. *York Hospital* Follows Applicable Supreme Court Precedent and Is Inconsistent with the Ninth Circuit's Rejection of the Per Se Approach in This Case

Weiss v. *York Hospital*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), involved discrimination by medical doctors against osteopathic physicians seeking staff privileges at York Hospital. 745 F.2d at 818. The Third Circuit characterized the exclusionary practices as the equivalent of a concerted refusal to deal, or a boycott. 745 F.2d at 818-19. The court concluded that the medical doctors were using their relationship with the hospital to exclude their competitors, the osteopaths. There, as here, there was no evidence that either group provided a superior service. The *Weiss* court held that, since the defendants' conduct constituted a "group boycott" or a "concerted refusal to deal," it was illegal per se. 745 F.2d at 818-20.

In *Weiss*, the Third Circuit noted that the exclusion of *individual* doctors based on lack of professional competence or unprofessional conduct should be viewed as a form of industry self-regulation subject to the rule of reason rather than a per se rule. 745 F.2d at 820.

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[14] *Id.* [Pet. App. at 13.]

Clearly the exclusion of Petitioner Bhan from performing anesthesia services at Manteca Hospital cannot remotely be justified as an individual credentialing decision. The exclusion applied to all CRNAs, not merely Bhan. Moreover, CRNA Bhan's professional competence was not challenged. The physicians and the hospital acted to protect two anesthesiologists from CRNA competition. No attempt was made to justify the action as a decision on Bhan's professional ability. Rather, the court below sought to justify on the basis of speculation that it might enhance the hospital's competitive position.

We submit that, in line with the approach taken by the *Weiss* court, Manteca's MDA only policy should be characterized as a per se violation of the antitrust laws. As stated with respect to clinical psychologists in Note, *The Physician Cartel-Potential Hospital Federal Antitrust Liability in Class-Based Denial of Staff Privileges to Clinical Psychologists*, 39 Drake L. Rev. 509, 520-21 (1989-90):

> "Hospital staff privilege cases can be analogized to a form of industry regulation appropriate for rule of reason balancing. In this context, the rule of reason is used when three criteria are present: (1) a mandate for self-regulation; (2) action consistent with the policy justifying self-regulation and (3) application of procedural safeguards. The presence of JCAH standards on medical staff privileges, state laws that mandate peer review, and the implementation of the Health Care Quality Improvement Act of 1986 provide sufficient self-regulation policy and due process safeguards to bring most physicians' privilege decisions under the rule of reason analysis. Because decisions regarding non-physicians fall outside the sphere of self-regulation, however, the justification for a rule of reason approach is lacking in cases involving class-based denial of staff privileges to clinical psychologists. Giving physicians the benefit of self-regulators' lessened judicial scrutiny under the rule of reason would be illogical

> when their decision making moves outside the sphere of self-regulation. *Physician regulation of another independent health care discipline, which results in a horizontal group boycott, is more appropriately and logically analyzed under the per se rule.*" (Emphasis added. Footnotes omitted.)

A per se approach is in accord with this Court's holding in *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 212 (1959), that

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468. *Cf. United States* v. *Trenton Potteries Co.*, 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 213, 'such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.'"

This Court's decision in *Business Elec. Corp.* v. *Sharp Elec. Corp.*, 485 U.S. 717 (1988), has been interpreted as limiting *Klor's* to ". . . horizontal concerted action at the same level of the distribution hierarchy . . ." Holmes, *Antitrust Law Handbook* 250 (1991 ed.). However, even if so limited, the *Klor's* holding applies to Petitioner Bhan in that Manteca's boycott of CRNAs is both vertical and horizontal. It is horizontal in that the MDAs are shielded from competition from all CRNAs who would otherwise be able to offer anesthesia services to surgeons at Manteca Hospital.

Physician boycotts of nonphysician health care providers, such as CRNAs, should be accorded per se treatment because such boycotts eliminate competition and serve to increase health care costs. As this Court stated in *Arizona* v. *Maricopa County Medical Soc'y*, 457 U.S. 345, 344 (1982),

> "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."

The Court went on to say in a footnote,

> "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." *Id.* n.15.

As the dissenting opinion of four Justices in *Summit Health Ltd.* v. *Pinhas*, 111 S. Ct. 1842, 1851 (1991), pointed out with respect to a boycott of one eye surgeon,

> "[Dr. Pinhas] merely alleges a conspiracy to exclude *him* from that market by a sort of group boycott. *Since group boycotts are per se violations* (not because they necessarily affect competition in the relevant market, but because they deprive at least some consumers of a preferred supplier, see R. Bork, The Antitrust Paradox 331-332 (1978))", Dr. Pinhas need not prove an effect on competition in the Los Angeles area to prevail, if the Sherman Act applies." (Emphasis added.)

Nothing in the majority opinion is inconsistent with the dissent's assumption that a per se rule would apply to the boycott of Dr. Pinhas.

The court below also stated that "the only actual effect shown is that one nurse anesthetist no longer works at one hospital. This alone is not enough to demonstrate actual detrimental effects on competition." 929 F.2d at

1414. This conclusion is not true or is it justified. *Weiss* v. *York Hospital, supra*; *Fuentes* v. *South Hill Cardiology*, —— F.2d —— (3rd Cir. Oct. 1, 1991, No. 90-3493, available on Westlaw, 91 WL 192019.

This Court recently held in *Summit Health Ltd.* v. *Pinhas*, 111 S. Ct. 1842, 1844 (1991), that the boycott of a single surgeon can constitute an actionable violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, because the essence of the violation is the illegal agreement itself, and the "proper analysis focuses, not upon actual consequences but rather upon the potential harm that would ensue if the conspiracy was successful." In the case below, we submit that the requisite effect on interstate commerce is established by the fact that a class of health care providers, the CRNAs whose nationwide interest AANA represents, are completely excluded from practicing their profession at Manteca Hospital. And, as noted above, the parties did not dispute that the prima facie showing of conspiracy constituted a restraint that "affected interstate commerce." 929 F.2d at 1410.

Granting the Petition would thus permit this Court to clarify the applicability of its decision in *Summit Health* to situations, such as those in the present case, where a class of health care providers is completely excluded from the practice of its profession in the hospital where the anesthesia providers competed. Such anti-competitive practices, even if not subject to per se condemnation, should be condemned under a rule of reason analysis where, as here, both the existence of a conspiracy and an effect on interstate commerce are not at issue.

This Court should grant the Petition to resolve the conflict between the Ninth and Third Circuits concerning the application of the per se rule to condemn boycotts, to which hospitals and physicians are parties, of CRNAs and other nonphysician health care providers.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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